Spring 2000

Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate

Gary J. Simson
Cornell Law School, simson@law.mail.cornell.edu

Erika A. Sussman
Swidler Berlin Shereff Friedman

KEEPING THE SEX IN SEX EDUCATION: THE FIRST AMENDMENT'S RELIGION CLAUSES AND THE SEX EDUCATION DEBATE

GARY J. SIMSON & ERIKA A. SUSSMAN*

As Madonna has shown, when sex and religion come together, strange things tend to happen. One place where this is surely true is today's sex education debate. After describing in Part I of this Article the two dominant approaches to sex education today—"comprehensive" and "abstinence-only-until-marriage"—we will consider in Parts II and III the implications of the First Amendment's Religion Clauses[1] for both approaches. School districts regularly allow parents to opt out of comprehensive sex education on their children's behalf. To the extent that legislatures and school boards are operating on the assumption that such an opt-out is required by the Free Exercise Clause, our analysis in Part II suggests that they are mistaken. The debate on comprehensive versus abstinence-only sex education has been cast thus far in policy rather than constitutional terms. Our analysis in Part III suggests that abstinence-only programs present difficulties under the Establishment Clause that may bar their adoption as a matter of constitutional law. We conclude in Part IV by highlighting that the Religion Clauses have significance for lawmakers beyond that mandated by the courts.

---

* Gary J. Simson is Associate Dean for Academic Affairs and Professor of Law at Cornell Law School. Erika A. Sussman is a Litigation Associate at Swidler Berlin Shereff Friedman, LLP. The authors are grateful to Stephen Garvey, Carol Grumbach, Risa Lieberwitz, and Lisa Thurau-Gray for very helpful comments on an earlier draft, and to Rosalind Simson for invaluable suggestions at various stages of the Article's preparation. The authors also thank Peggy Burge for exceptionally able assistance with the research.

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The Religion Clauses have been held to apply to state and local government under the Due Process Clause of the Fourteenth Amendment. *See* Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

I. TWO APPROACHES

Sex education programs vary from state to state and from school district to school district within a state. Typically, the state legislature or department of education mandates or recommends certain sex education guidelines, and local school boards enjoy a fair amount of autonomy in crafting the particular sex education curriculum for their district. In recent years, groups on opposite sides of the sex education debate have vigorously lobbied state and local lawmakers on behalf of two widely divergent approaches—comprehensive sexuality education and abstinence-only-until-marriage education. Lawmakers have responded by adopting one or the other approach or, quite often, some combination of the two.[2]

Comprehensive sexuality education takes a broad and multi-faceted approach to adolescent reproductive health. It teaches students the benefits of abstaining from early sexual activity, but also recognizes that some students will choose otherwise and offers a broad perspective on the role that sexuality plays in an individual's personal development. It seeks to provide students with a broad range of pertinent and factually accurate information. In the words of a leading organizational proponent of the comprehensive approach, the approach places a premium on helping students "develop the self-esteem, personal responsibility, relationship skills, and respect for self and others that are necessary to withstand pressure to have sex or to insist on using contraceptives and disease prevention measures if they choose to be sexually active."[3]

---

2. For a recent nationwide survey of school district practices, see David J. Landry et al., *Abstinence Promotion and the Provision of Information About Contraception in Public School District Sexuality Education Policies*, 31 FAM. PLAN. PERSP. 280 (1999). According to the survey, 31% of school districts do not have a district-wide policy to teach sex education, but rather leave decisions about sex education to the individual schools or teachers. Only 14% of students in grades six or higher, however, live in districts without a district-wide policy to teach sex education. *See id.* at 282.

3. National Abortion and Reproductive Rights Action League (NARAL), *The Need for Comprehensive Sexuality Education: Fact Sheet* (visited Mar. 23, 2000) <http://www.naral.org/publications/facts/1999/need_sexed.html>. Other leading organizational proponents of the comprehensive approach include the Sexuality Information and Education Council of the United States (SIECUS) and the Planned Parenthood Federation of America. *See* NATIONAL GUIDELINES TASK FORCE, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION: KINDERGARTEN-12TH GRADE at v, 55-56 (2d ed. 1996). Leading organizational proponents of the abstinence-only approach include Focus on the Family, the Committee on the Status of Women, and the National Coalition for Abstinence Education. *See* Annette Fuentes, *No Sex Ed*, IN THESE TIMES, Dec. 28, 1997, at 16.

A set of guidelines developed by a national task force in 1991 and updated in 1996 exemplifies the comprehensive approach. Though not a curriculum as such, *Guidelines for Comprehensive Sexuality Education: Kindergarten-12th Grade*[4] provides state and local lawmakers with a detailed outline of what a comprehensive sexuality education curriculum should entail. According to the Guidelines, a sex education program should have four primary goals:

> INFORMATION: To provide accurate information about human sexuality, including: growth and development, human reproduction, anatomy, physiology, masturbation, family life, pregnancy, childbirth, parenthood, sexual response, sexual orientation, contraception, abortion, sexual abuse, HIV/AIDS and other sexually transmitted diseases.
>
> ATTITUDES, VALUES, AND INSIGHTS: To provide an opportunity for young people to question, explore, and assess their sexual attitudes in order to understand their family's values, develop their own values, increase self-esteem, develop insights concerning relationships with families and members of both genders, and understand their obligations and responsibilities to their families and others.
>
> RELATIONSHIPS AND INTERPERSONAL SKILLS: To help young people develop interpersonal skills, including communication, decision-making, assertiveness, and peer refusal skills, as well as the ability to create satisfying relationships. Sexuality education programs should prepare students to understand their sexuality effectively and creatively in adult roles. This would include helping young people develop the capacity for caring, supportive, non-coercive, and mutually pleasurable intimate and sexual relationships.
>
> RESPONSIBILITY: To help young people exercise responsibility regarding sexual relationships, including addressing abstinence, how to resist pressures to become prematurely involved in sexual intercourse, and encouraging the use of contraception and other sexual health measures. Sexuality education should be a central component of programs designed to reduce the prevalence of sexually-related medical problems; these include teenage pregnancies, sexually transmitted diseases including HIV infection, and sexual abuse.[5]

The Guidelines also set forth six "key concepts" as essential components of a sex education program: (1) "Human Development,"

4. NATIONAL GUIDELINES TASK FORCE, *supra* note 3. The Sexuality Information and Education Council of the United States (SIECUS), a private organization, put together the task force and helped prepare and published the original and updated versions of the Guidelines.

5. *Id.* at 3, 5.

including "reproductive anatomy and physiology, reproduction, puberty, body image, and sexual identity and orientation"; (2) "Relationships," including "families, friendship, love, dating, marriage and lifetime commitments, and raising children"; (3) "Personal Skills," including "values, decision-making, communication, assertiveness, negotiation, and looking for help"; (4) "Sexual Behavior," including "sexuality throughout life, masturbation, shared sexual behavior, abstinence, human sexual response, fantasy, and sexual dysfunction"; (5) "Sexual Health," including "contraception, abortion, sexually transmitted diseases including HIV infection, sexual abuse, and reproductive health"; and (6) "Society and Culture," including "sexuality and society, gender roles, sexuality and the law, sexuality and religion, diversity, sexuality and the arts, and sexuality and the media."[6] Proceeding on the view that sex education should begin early on and last throughout a child's education, the Guidelines divide each of these key concept areas into developmentally appropriate education levels.[7]

Unlike comprehensive sexuality education, abstinence-only-until-marriage sex education presents abstinence until marriage as the only reasonable choice for unmarried teens. *Sex Respect: The Option of True Sexual Freedom*,[8] a curriculum used in numerous schools,[9] epitomizes the abstinence-only approach. *Sex Respect* emphasizes the dangers of premarital sex, stating at one point:

---

6. *Id.* at 9.

7. For examples of state sex education guidelines significantly influenced by the comprehensive approach, see MASS. DEP'T OF EDUC., MASSACHUSETTS COMPREHENSIVE HEALTH CURRICULUM FRAMEWORK 21-23 (1999) (also available at <http://www.doe.mass.edu/frameworks/health99/core.html>); N.J. DEP'T OF EDUC., NEW JERSEY CORE CURRICULUM CONTENT STANDARDS FOR COMPREHENSIVE HEALTH AND PHYSICAL EDUCATION, std. 2.4 (1996) (also available at <http://www.state.nj.us/njded/cccs/07hpestan2_4.html>); OR. REV. STAT. § 336.455 (1995).

8. COLEEN KELLY MAST, SEX RESPECT: THE OPTION OF TRUE SEXUAL FREEDOM (rev. ed. 1997). The curriculum package consists of a *Student Workbook* [hereinafter MAST, SEX RESPECT— STUDENT WORKBOOK], *Teacher Manual* [hereinafter MAST, SEX RESPECT— TEACHER MANUAL], and *Parent Guidebook* [hereinafter MAST, SEX RESPECT—PARENT GUIDEBOOK].

9. According to the *Sex Respect* website, *Sex Respect* was "used in more than 2500 school systems nationwide for the 1996-97 school year." *See* Respect Inc., *General Introduction to SEX RESPECT* (visited Mar. 23, 2000) <http://www.sexrespect.com/generalintro.html>. (Obviously in some need of updating, the website, when visited in March 2000, offered this statistic for 1996-97 as the number of school systems in which *Sex Respect* is "currently" used and did not provide statistics for the three school years since the 1996-97 one.) According to a recent survey, 69% of public school districts have a district-wide policy to teach sex education, and 35% of such districts require abstinence-only programs. *See* Landry et al., *supra* note 2, at 282-83.

> If premarital sex came in a bottle, it would probably have to carry a Surgeon General's warning, something like the one on a package of cigarettes: THERE'S NO WAY TO HAVE PREMARITAL SEX WITHOUT HURTING SOMEONE.[10]

Underlining the ease with which "[p]assion becomes like a car with worn-down brakes speeding downhill,"[11] *Sex Respect* warns that physical intimacy leads to destructive and uncontrollable results. *Sex Respect* seeks to leave no doubt in students' minds that abstinence until marriage is the morally correct course of behavior. "Do the right thing. Wait for the ring,"[12] reads the caption framing a picture of a bride and groom in the student workbook.

Sex Respect has little to say about condom use and nothing good. Cautioning that "[y]ou can never be sure the condom has no defects or will not tear, leak or slip,"[13] *Sex Respect* emphasizes to students the risk that condoms may fail to provide the physical protection anticipated. It also broadly warns students that "[c]ontraceptives can also carry some health risks"[14] and firmly reminds them that "condoms do nothing to protect you from the emotional and psychological consequences of premarital sex."[15]

Sex Respect teaches that abortion is not a reasonable option, morally or medically, in the event of an unplanned pregnancy. It highlights quite graphically any possible physical complications that a pregnant teenager may experience during or after the abortion procedure.[16] "Is it fair," *Sex Respect* asks, "to make the baby die because of a decision his or her parents made?"[17] A pregnant teen who "is not selfish," *Sex Respect* explains, "can see adoption as her sacrifice for the good of her baby."[18]

---

10. MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 35.
11. *Id.* at 7.
12. *Id.* at 64.
13. *Id.* at 56.
14. *Id.* at 36.
15. *Id.* at 56.
16. According to the *Student Workbook*:

> If she is a young teen, pregnant for the first time, there's a chance the abortion will cause heavy damage to her reproductive organs. Heavy loss of blood, infection, and puncturing of the uterus may all lead to future pregnancy problems such as premature birth or misplaced pregnancy (in which the baby begins to develop in a fallopian tube or in the cervix, not in the uterus).
> There may also be an increased rise [sic] of miscarriage or birth complications with future pregnancies. Finally, the woman may suffer infertility and be unable to become pregnant later, even when she is married, ready and eager for parenthood.

Id. at 95 (citations omitted).
17. *Id.*
18. *Id.* at 96.

Very traditional treatment of sex roles is a basic ingredient of *Sex Respect*'s family-values type approach. A recurrent theme is that boys are generally looking for sex in a relationship while girls are typically looking for love.[19]

Sex Respect defends the "great American invention"[20] of dating as a valuable means for a couple to get to know one another well before marriage, but it also teaches that a return to the older tradition of arranged marriages would have its advantages. In particular, "[m]ates would be more likely to have similar economic and educational levels, making for more harmony than that in a 'mixed marriage.'"[21]

Finally, as far as homosexuality, *Sex Respect* takes the view that the less that is said the better. Homosexuality is only explicitly mentioned in connection with AIDS, and the discussion is limited to linking AIDS to homosexual behavior and warning students to avoid such behavior if they hope to avoid AIDS.[22] Explaining why "anal intercourse involves an especially high risk for HIV infection," *Sex Respect* points out that "[i]n such activity, body openings are used in ways for which they were not designed" and that "[d]uring such unnatural behaviors, additional damage is done to blood vessels and other body parts."[23]

---

19. The following comments in a hypothetical exchange between a doctor and a student epitomize the theme. According to the doctor:

> A male can experience complete sexual release with a female even if he doesn't particularly like her. A female, however, often experiences more sexual fulfillment with a person she trusts and who is committed to her. Some people describe the difference this way: Boys tend to use love to get sex; girls tend to use sex to get love.

Id. at 6.

20. *Id.* at 71.

21. MAST, SEX RESPECT—TEACHER MANUAL, *supra* note 8, at 70.

22. *See* MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 41, 46, 52.

23. *Id.* at 52. For examples of state sex education guidelines patterned after the abstinence-only approach, see ALA. CODE § 16-40A-2 (1995); IDAHO CODE § 33-1608 (1981); N.C. GEN. STAT. § 115C-81(e1) (1999). The approach received a significant boost in 1996, when Congress passed legislation allocating $50 million a year for federal fiscal years 1998 through 2002 for "abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity." 42 U.S.C. § 710 (Supp. IV 1999). Under the law, which defines "abstinence education" in a manner very much in keeping with the abstinence-only approach, *see id.*, states must match every four federal dollars they receive with three state-raised dollars, thus potentially generating $88 million a year for the program. According to a detailed study of the entitlement program's first year of implementation, 48 states participated in the program in fiscal year 1998, and all 50 states applied for funds for the following year. *See* SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, BETWEEN THE LINES: STATES' IMPLEMENTATION OF THE FEDERAL GOVERNMENT'S SECTION 510(b) ABSTINENCE EDUCATION PROGRAM IN FISCAL YEAR 1998, at 7-9

II. COMPREHENSIVE SEX EDUCATION AND THE FREE EXERCISE CLAUSE

A free exercise claim in opposition to comprehensive sex education would be expected to take one of two forms depending upon whether the particular program gives parents the opportunity to opt out on their child's behalf. If the program has no opt-out provision, the free exercise claim would seek a court-ordered exemption from the program. If the program has such a provision, the free exercise claim would call for judicial invalidation of the program across the board. Section A below addresses the viability of free exercise challenges of the former, as-applied variety. The viability of free exercise challenges of the latter, facial variety is the subject of Section B. Section C raises a fundamental problem with free exercise challenges of both varieties.

A. CLAIMS FOR COURT-ORDERED EXEMPTIONS

By far the most hotly debated free exercise issue in recent years is courts' authority to carve out exemptions from generally applicable laws.[24] Prior to the Supreme Court's decision in 1990 in *Employment Division v. Smith*,[25] it was settled that the Free Exercise Clause requires courts to carve out an exemption from a generally applicable law if (1) the religious liberty claimant can prove that the law substantially burdens his or her free exercise of a sincere religious belief and (2) the state can not show that denying the claimant an exemption is necessary to serve a compelling state interest.[26] Though purporting to be respectful of existing precedent, Justice Scalia's opinion for the 5-4 majority in *Smith* in fact dramatically broke with it and discarded this central premise of the Court's approach. With the exception most notably of "hybrid" claims—ones implicating both free exercise and another constitutional right[27]—the Court in *Smith* made rigorous review of religious liberty claims for exemptions from generally applicable laws a thing of the past. Indeed, far from calling for the "strict

(1999). Some states favoring comprehensive sexuality education in their schools accepted funds but, as allowed by the statute, used them for non-school-based programs. *See id.* at 14.

24. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

25. 494 U.S. 872 (1990).

26. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

27. *See Smith*, 494 U.S. at 881-82.

scrutiny" traditionally afforded such claims, the Court now simply treated the claims as outside the ambit of the Free Exercise Clause.

At the urging of a broad coalition of religious and civil liberties groups, Congress in 1993 attempted to reinstate the pre-*Smith* approach to court-ordered exemptions.[28] Invoking its enforcement power under section 5 of the Fourteenth Amendment, Congress virtually unanimously enacted the Religious Freedom Restoration Act.[29] However, in 1997, the Supreme Court in *City of Boerne v. Flores*[30] held that the Act exceeded Congress's section 5 authority and struck it down, thereby returning the Court's approach in *Smith* to a position of undisputed force at least for the time being. The deep dissatisfaction with *Smith* that had led to the adoption of the Religious Freedom Restoration Act resurfaced almost immediately after the *Boerne* decision, and Congress has been actively considering other legislative means for doing what the Act sought to achieve.[31]

Ultimately, whether or not the *Smith* approach survives may not be crucial to the fate of free exercise claims for court-ordered exemptions from comprehensive sex education programs. Because the challenged programs apply to all schoolchildren without regard to religion and in no sense target any religious group or practice for disadvantage, they meet the *Smith* Court's description of "generally applicable" laws. Claims for court-ordered exemptions from the programs therefore seem, as an initial matter, to fall within *Smith*'s broad proscription against claims for exemptions from generally applicable laws. However, like the claims successfully raised by the Amish in *Wisconsin v. Yoder*[32] in gaining a court-ordered exemption for their children from compulsory schooling beyond eighth grade, these claims appear to implicate both free exercise and "the right of parents . . . to direct the education of their children."[33] Since the Court in *Smith* cited *Yoder* as an example of the type of "hybrid situation" in which courts have authority to carve out exemptions from generally applicable laws,[34] religion-based claims for exemptions from comprehensive sex

28. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895-96 (1994); David E. Anderson, *Signing of Religious Freedom Act Culminates 3-Year Push*, WASH. POST, Nov. 20, 1993, at C6.

29. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

30. 521 U.S. 507 (1997).

31. *See* David G. Savage & Richard Simon, *Religious Rights: The Devil Is in the Details*, L.A. TIMES, Aug. 1, 1999, at A1.

32. 406 U.S. 205 (1972).

33. *Smith*, 494 U.S. at 881.

34. *See id.* at 881-82.

education appear to be cognizable under *Smith*'s hybrid claims exception.

It is one thing, however, to say that, as hybrid claims, religious liberty challenges to comprehensive sex education overcome the hurdle to serious judicial scrutiny erected by *Smith*. It is quite another to say that such challenges ultimately should succeed. As discussed in Subsection 1 below, it is highly unlikely that a challenge would satisfy the showing required under both *Smith* and prior case law of a *substantial* burden on religious liberty. Furthermore, as discussed in Subsection 2, even if a challenge were thought to meet this substantial-burden requirement, it still should not prevail because of the strong justification that the state can offer in defense of its program.

At the outset it perhaps should be emphasized that, although the widespread availability of opt-out provisions generally obviates the need for challenges of this sort, the viability of such challenges is a question of considerable practical importance. If, as seems likely, lawmakers in adopting opt-out provisions are motivated at least in part by a concern about free exercise challenges, they may want to rethink the wisdom of having such provisions if it becomes clear that such challenges should fail.

1. *Nature of the Burden on Free Exercise*

Although comprehensive sex education teaches the value of abstinence before marriage and of sexual fidelity within marriage, it plainly takes an approach to premarital and extramarital sex that is more permissive than fundamentalist Christian and other religions that teach that such sex is sinful and necessarily avoided. By the same token, although comprehensive sex education seeks to make students aware of the difficult consequences of abortion, it obviously is more tolerant of abortion than religions that treat abortion as murder; and although it does not present homosexuality as preferable to heterosexuality, it is clearly more accepting of homosexuality than religions that treat homosexual orientation as unnatural and homosexual sex as an abomination.

It is therefore not hard to see why some parents would object on religious grounds to a requirement that their children receive comprehensive sex education. Such a requirement would expose the children to ideas that the parents find offensive, and it would make more difficult parental efforts to pass along to their children religious precepts that they hold dear. It is far from clear, however, that such objections

provide the basis for a winning free exercise claim. They indicate a burden on free exercise that appears to fall considerably short of the requisite "substantial" burden, as that term generally has been understood.

In asking whether there is a substantial burden on religious exercise, the Supreme Court repeatedly has framed the question in terms of whether the state is coercing the free exercise claimants either to do something forbidden by their religion or to refrain from doing something mandated by their religion.[35] The Court has recognized that the coercion central to a free exercise claim may come in a variety of forms, ranging from criminal sanctions to the threatened denial of an important governmental benefit. Whatever form the coercion takes, however, the Court has maintained that it does not create a substantial burden on religious exercise unless it requires action or inaction contrary to religious beliefs.

By requiring children to receive comprehensive sex education, the state is no doubt making it harder for some parents to inculcate their children in their religious beliefs, but it is not compelling them or their children to engage in conduct prohibited by their religion or to refrain from conduct mandated by their religion. A claim for a free exercise exemption from a comprehensive sex education program therefore would appear to fail for lack of a burden of sufficient magnitude to meet the Court's conception of substantiality.

Parents seeking such an exemption may argue that *Wisconsin v. Yoder* is authority for a more expansive conception of substantial burden than the one discussed above and that this more expansive conception encompasses the type of burden placed on them by a requirement that their children receive comprehensive sex education. More specifically, they may contend that *Yoder* stands for the proposition that the state substantially burdens religious exercise when it exposes children to ideas that seriously conflict with religious precepts that their parents seek to instill in them.[36]

Fairly understood, however, *Yoder* stands for much less than the preceding line of argument suggests and does not offer significant support for the claimed exemption. As Chief Justice Burger's opinion for

35. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 698-99 (1989); Thomas v. Review Bd., 450 U.S. 707, 716-18 (1981).

36. *Cf.* Brown v. Hot, Sexy & Safer Productions, 68 F.3d 525, 539 (1st Cir. 1995) (discussing and rejecting appellants' reliance on *Yoder* in challenge to compelled attendance at high school AIDS awareness assembly).

the Court in *Yoder* made clear time and again, the Court viewed the free exercise claim raised by the Amish in *Yoder* as highly unusual. In holding that the parents' free exercise rights were substantially burdened by a requirement that they send their children to school beyond eighth grade, the Court did not simply rest on the fact that the children would be exposed to ideas seriously at odds with the parents' faith. Rather, it emphasized that, because the Amish religion depends so centrally on avoiding the type of "worldly influences"[37] to which children are exposed in school after eighth grade, exposure in this instance would inevitably and irreversibly affect Amish children's religious development and thereby seriously limit parents' capacity to guide their children's religious upbringing. According to the Court, this exposure is so antithetical to the Amish religion that a compulsory education requirement beyond eighth grade "carries with it a very real threat of undermining the Amish community and religious practice as they exist today."[38] The requirement "would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[39]

In short, to the extent that *Yoder* may expand the notion of substantial burden to include instances of exposure to ideas at odds with one's faith, it does so only marginally. Far from recognizing any sort of broad-based "exposure principle," *Yoder* is of no help to the type of free exercise claim that, for example, fundamentalist Christians might make for an exemption from compulsory sex education.[40]

2. *Nature of the State's Justification*

Assuming for purposes of argument that parents seeking a free exercise exemption from compulsory sex education could show a substantial burden on their religious exercise, their claim for an exemption would trigger "strict" judicial scrutiny. The relevant question would then be whether the state could show that requiring the claimants' children to receive comprehensive sex education is necessary to a compelling state interest.

---

37. *Yoder*, 406 U.S. at 217.

38. *Id.* at 218.

39. *Id.* at 219.

40. With regard to the possibility that some religious claimants might be able to show extraordinary, *Yoder*-like circumstances warranting a free exercise exemption from sex education, see Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420 (N.Y. 1989) (addressing, without resolving, an attempt by members of the Plymouth Brethren—a religious group with about 2,000 adherents in the United States—to secure an exemption from AIDS instruction based on the claim that their religion requires that they not only "separate from evil" but also avoid exposure to "the detail of evil").

As an initial matter, it is important to recognize that in applying "strict scrutiny" to claims for free exercise exemptions, both the Supreme Court and lower courts have been far more willing to find that the state has met its burden of justification than they have been in applying this necessary-to-a-compelling-interest test in the equal protection area. While the courts' application of strict scrutiny in equal protection cases could fairly be characterized as "'strict' in theory and fatal in fact,"[41] the same could not reasonably be said of their application of strict scrutiny in free exercise cases.[42]

These differences in outcome in applying the test may partly reflect the fact that the kinds of laws that trigger strict scrutiny in the equal protection area—most notably, laws that discriminate against racial minorities—tend to be so rooted in gross stereotypes and bias that the state can offer at best only paltry justifications for them. The differences in outcome may also reflect the fact that the laws at issue in the free exercise cases are much more inviting of deference to legislative judgment than those in the equal protection cases. There is rarely reason to suspect these generally applicable laws of any particular bias.[43] In any event, whatever the precise explanation for these differences in outcome, the differences plainly exist, and they bear significantly on the question whether a claim for a free exercise exemption may be expected to succeed.

United States v. Lee[44] illustrates the leeway that the Court allows the government in applying strict scrutiny in free exercise cases. Lee, an Amish farmer and carpenter, employed several other Amish. Maintaining that his religion barred participation in the nation's mandatory social security system, Lee refused to pay his social security taxes and sought a free exercise exemption from his statutory obligation to do so.

The Court found substantial interference with Lee's free exercise rights, but also found that the applicable strict scrutiny test was met.

---

41. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

42. *See* Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 459-60 (1996).

43. *See id.* at 460 & n.62. For the view that the results in free exercise cases reflect a tacit decision by courts to apply a less demanding test than the one they formally claim to apply, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127-28 (1990).

44. 455 U.S. 252 (1982).

According to the Court, "Because the social security system is nationwide, the governmental interest is apparent," and the Court went on quickly to hold that "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high."[45]

Turning to the question of whether denying the claimed exemption was necessary to serve the latter interest, the Court made no attempt to argue that the government could not readily accommodate an exemption for Amish employers. Particularly in light of the fact, acknowledged by the Court, that Congress out of regard for religious liberty concerns had provided an exemption for self-employed Amish,[46] such an argument would have been impossible to sustain. Instead, the Court found the requisite necessity for denying the exemption in the risk that accommodating the Amish claims would open the door to "myriad" other religiously based claims for exemptions from tax laws.[47]

Against the backdrop of *Lee* and the Court's other free exercise cases finding that the strict scrutiny test is met,[48] it appears that the state may well be able to defeat a claim for a free exercise exemption to comprehensive sex education even if the claimants succeed in establishing that their religious exercise is substantially burdened. This seems clearest with regard to those aspects of comprehensive sex education that directly bear on issues of contracting and transmitting AIDS. The state plainly has a compelling interest in both protecting individual citizens from AIDS and guarding against the transmission of this deadly and easily spread disease. Proponents of abstinence-only sex education may argue that detailed discussion of the ways in which AIDS is contracted and transmitted and of the importance of using contraceptives is not essential to serve this compelling interest. In light, however, of the magnitude of the public health threat posed by AIDS, continued uncertainty about various aspects of the disease, and studies indicating the value of in-depth AIDS education in reducing sexual risk-taking behavior,[49] courts should be slow to second-

45. *Id.* at 258-59.

46. *See id.* at 262.

47. *See id.* at 259-60. For the view that the Court in *Lee* "overstate[d]" this risk, see *id.* at 262-63 & n.1 (Stevens, J., concurring).

48. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Gillette v. United States, 401 U.S. 437 (1971).

49. *See* Douglas Kirby et al., *School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness*, 109 PUB. HEALTH REP. 339 (1994) (discussing results of various studies).

guess the state's judgment that such a program is a necessary public health measure.

The state's justification for requiring all children to receive those aspects of comprehensive sex education aimed more generally at children's sexual development and psychological well-being may not be as immediately impressive as its justification for AIDS education, but it is very forceful nonetheless. The state has a powerful interest in providing, by education and otherwise, for the health and welfare of its young people. As the courts repeatedly have recognized, the state is vitally concerned both with their present well-being and with helping to ensure their development into able and fully contributing members of society.[50] There will almost always be room to question whether particular elements of a comprehensive sex education program are essential—either in general or as to particular individuals—to vindicate these concerns. Respect for the state's implicit judgment that the various elements are needed, however, would be in keeping with the Court's approach to strict scrutiny in free exercise cases. When the state legislates on important and difficult issues on which consensus as to right answers is notably absent, the lesson of the Court's free exercise cases is to gauge the necessity of the means-end relationship with substantial deference to the state.

Since the free exercise claim in *Yoder* bears some factual resemblance to the type of claim under discussion, it may be appropriate before concluding this analysis of the state's justification to highlight the difference between the justification found wanting in *Yoder* and the type of justification at issue here. Just as the Court in *Yoder* made clear the narrowness of its holding that the Amish were substantially burdened by a requirement that their children attend school beyond eighth grade, so did it underline the limited implications of its holding that the state lacked adequate justification for insisting that the Amish abide by the requirement. The Court did not question the potency of the state's interests in "prepar[ing] citizens to participate effectively and intelligently in our open political system" and in "prepar[ing] individuals to be self-reliant and self-sufficient participants in society."[51] Instead, relying heavily upon evidence in the record about the highly distinctive nature of the Amish community and their system of

50. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 640-41 (1968); Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944); Hutchins v. District of Columbia, 188 F.3d 531, 539, 541-42 (D.C. Cir. 1999) (en banc); People *ex rel.* Wallace v. Labrenz, 104 N.E.2d 769, 773-74 (Ill. 1952).

51. *Yoder*, 406 U.S. at 221.

"learning-by-doing," the Court found a less than necessary means-end relationship:

> [T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. . . . It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[52]

As Justice White stated in a concurring opinion, under the unusual circumstances of the case, "the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school."[53]

Although exempting Amish children from one or two years of high school may not have been particularly harmful to the state's educational interests in *Yoder*, exempting students from years of study in the subject of sex education is highly problematic in terms of the interests in comprehensive sex education discussed above. As in *Yoder*, it might be argued that the family would supply education functionally equivalent to that offered by the school. Given the stakes involved, however, the state would have a much more powerful justification for insisting on providing the education itself. This would most obviously be true with regard to AIDS education, where the implications for the individual child and the community at large of inadequate education are so devastating. It would also hold true, however, for other aspects of comprehensive sex education, which bear so strongly on the child's sexual development and psychological well-being.

B. Claims for Facial Invalidation

If a comprehensive sex education program allows parents to opt out on their children's behalf, free exercise claims for court-ordered exemptions would obviously be beside the point. Some parents, however, have challenged the validity of such programs on free exercise grounds on the theory that, as a result of peer pressure felt by their children to do what the other children are doing, their ability to opt

52. *Id.* at 222 (citation omitted).
53. *Id.* at 241 (White, J., concurring).

out on their children's behalf is in fact quite limited.[54] For support, the parents typically have relied on the Court's landmark school prayer decision, *Abington School District v. Schempp*,[55] where the Court struck down Bible-reading and prayer practices even though the schools provided for excusing students who did not wish to participate.

Claims of this sort for facial invalidation of comprehensive sex education programs confront even more formidable obstacles to success than the claims for exemptions discussed in Section A. For all practical purposes, the analysis may begin and end with the requisite free exercise inquiry into the substantiality of the burden. As already discussed, it is very difficult to argue that a program with no opt-out provision substantially burdens free exercise, because the requisite coercion to act contrary to religious belief appears to be missing. Even if adding an opt-out provision does not eliminate every bit of coercion that the sex education program places on the parents, it surely diminishes the coercion considerably. Since the level of coercion was almost certainly constitutionally insignificant without the opt-out provision, it is virtually inconceivable that it is constitutionally significant with it.

Schempp, which rested on Establishment Clause rather than Free Exercise Clause grounds, offers no real authority to the contrary. In invalidating the practices under review despite students' ability to opt out, the Court made no finding that the practices coerced students to act contrary to their religious beliefs. Instead, it emphasized that the Establishment Clause, unlike the Free Exercise Clause, requires no finding of coercion[56] and predicated its invalidation on a determination that, even with an excusal provision, the practices violate the Establishment Clause's bar on government endorsement of religion.[57]

Although *Schempp* is beside the point, another Establishment Clause decision, *Epperson v. Arkansas*,[58] is actually quite relevant to the matter at hand, though in a manner quite unhelpful to the parents'

54. *See, e.g.*, Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68, 80-82 (Ct. App. 1975); Medeiros v. Kiyosaki, 478 P.2d 314, 317-19 (Haw. 1970); Smith v. Ricci, 446 A.2d 501, 520-23 (N.J. 1982).

55. 374 U.S. 203 (1963).

56. *See id.* at 223 ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

57. *See id.* at 223-25.

58. 393 U.S. 97 (1968).

claims. In *Epperson* the Court struck down an Arkansas statute prohibiting public schools from teaching evolution. In doing so, the Court stated as a fundamental Establishment Clause precept that "[t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[59] If a court struck down on its face a comprehensive sex education program in response to some parents' objections that it inhibited their religious exercise, the court would appear to run afoul of *Epperson*'s prohibition on "tailor[ing]" the curriculum to comport with some people's religious beliefs.

C. Whose Free Exercise Right?

In *Wisconsin v. Yoder* Justice Douglas dissented in part from the Court's decision that the Free Exercise Clause required overturning the convictions of three Amish parents for violating Wisconsin's compulsory school attendance law. He maintained that in deciding the case, it was "[c]rucial" to know whether the three children whom the parents sought to exempt from education after eighth grade were religiously opposed to such additional education.[60] One of the three children had testified at trial that she was religiously opposed, and Justice Douglas joined the Court's judgment as to her father. Because there was no evidence in the record regarding the other two children's views, Justice Douglas refused to join the Court's judgment as to their parents.[61]

In addressing Justice Douglas's ground for dissent, Chief Justice Burger's opinion for the majority denied that there was any need under the circumstances of the case to know the children's views. According to the Chief Justice, the children's views were irrelevant because Wisconsin was prosecuting the parents, not their children, and because Wisconsin's "position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents—that is, without regard to the wishes of the child."[62] In addition, despite Justice Douglas's argument that "[i]f the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty

59. *Id.* at 106.
60. *See Yoder*, 406 U.S. at 243 (Douglas, J., dissenting in part).
61. *See id.*
62. *Id.* at 231.

upon their children,"[63] the Chief Justice denied that the Court was expressing any opinion on the question whether children could assert free exercise rights independent of those claimed on their behalf by their parents.[64]

Siding with Justice Douglas, Barbara Bennett Woodhouse has maintained that the Court's opinion in *Yoder* is far less neutral on the question of children's independent free exercise rights than the Chief Justice claimed. In her view, the Court in *Yoder* embraced the notion, rooted in earlier cases, that the child is "a key tool of the parents' free exercise but has no independent free exercise protections."[65] Moreover, she has argued forcefully that such a conception of children's rights is seriously deficient.[66]

Particularly in light of the recent movement to enact parental rights legislation and the dangers that such legislation holds for teenagers' physical and psychological health,[67] we find a great deal attractive in Professor Woodhouse's arguments. It is beyond the scope of this Article, however, to attempt to defend a position on this important and complex matter. Ultimately, in our view, little should turn on it in assessing the cogency of free exercise objections to comprehensive sex education. Even assuming for purposes of argument that the forcefulness of parents' objections of this sort is unaffected by their children's contrary views, the objections should still be seen as insufficiently forceful to prevail.

---

63. *Id.* at 242 (Douglas, J., dissenting in part).

64. *See id.* at 231.

65. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?"*: Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1114-15 & n.655 (1992).

66. *See id.* at 1112-22.

67. For discussion of the range of state laws and programs, including those pertaining to sex education, threatened by proposed measures that would expressly bar any infringement on parents' rights to direct their children's upbringing and education, see Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996); National Abortion and Reproductive Rights Action League (NARAL), *State "Parental Rights" Amendments and Legislation: Fact Sheet* (visited Mar. 27, 2000) <http:// www.naral.org/publications/facts/pra.html>. The novelty and peculiar threat of the parental rights laws under consideration lie primarily in their sweeping scope. The basic philosophy behind them can already be found in more particularized laws such as those requiring parental consent for minors to get an abortion. For critical analysis of laws of the latter variety, see J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion and the Quest for Reproductive Fairness*, 10 YALE J.L. & FEMINISM 1 (1998), and Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119 (1999).

III. ABSTINENCE-ONLY PROGRAMS AND THE ESTABLISHMENT CLAUSE

The Supreme Court's test for deciding whether a law oversteps the bounds of the First Amendment's prohibition on laws "respecting an establishment of religion" has been in a state of considerable flux for much of the past two decades. Under the three-prong test that the Court adopted in 1971 in *Lemon v. Kurtzman*,[68] a law needs to satisfy each of the following three conditions in order to pass Establishment Clause review: it must be supported by a secular purpose; its principal effect must not advance or inhibit religion; and it must not excessively entangle government and religion.[69] Formally, the Court has never disclaimed its adherence to the *Lemon* test. In a number of decisions, however, the Court has indicated its unwillingness to be bound strictly by the test. There is good reason to question whether the entanglement prong survives.[70] Moreover, particularly in the area of government funding of religion, there seems little question that the Court has taken a more relaxed approach to possible Establishment Clause violations than a conscientious application of the *Lemon* test would require.[71]

Amidst the uncertainties of the Court's Establishment Clause approach in recent years, one ingredient emerges with rather striking clarity: a prohibition on laws adopted for the purpose, or having the primary effect, of endorsing religion. Though implicit both in the *Lemon* test and in the *Schempp* purpose-and-effect test that ultimately became the first two prongs of the *Lemon* test,[72] this endorsement test was elevated to a position of prominence by Justice O'Connor with two concurring opinions in the mid-1980s.[73] Since that time, the endorsement test has consistently commanded the support of a majority, however narrow, of the Court.[74]

---

68. 403 U.S. 602 (1971).

69. *See id.* at 612-13.

70. *See* Agostini v. Felton, 521 U.S. 203, 232-35 (1997) (maintaining that it is "simplest" to treat entanglement "as an aspect of the inquiry [under the second prong] into a statute's effect" and overruling a decision that had rested on a finding that the third prong was violated).

71. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Bowen v. Kendrick, 487 U.S. 589 (1988).

72. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

73. *See* Wallace v. Jaffree, 472 U.S. 38, 67-84 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

74. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Allegheny County v. ACLU, 492 U.S. 573 (1989).

A forceful argument can be made that the teaching in public schools of abstinence-only-until-marriage sex education programs violates this core ingredient of the Court's contemporary Establishment Clause approach. More specifically, abstinence-only programs can be fairly understood as reflecting the views on sex urged by, and identified most prominently with, the Christian Coalition and its allies in the so-called "religious right."[75] After discussing the evidence that abstinence-only programs are rooted in a purpose of endorsing these conservative Christian views, we consider the significance of such evidence to an Establishment Clause challenge claiming that such programs violate the purpose and effect prongs of the endorsement test.

A. Evidence of Religious Purpose

The evidence that abstinence-only programs are rooted in religious purpose comes in a variety of forms. Consider, for example, the *Sex Respect* curriculum discussed in Part I of this Article and used in many public schools. *Sex Respect*, a set of three separate student, parent, and teacher manuals, was authored by Coleen Kelly Mast. Prior to writing *Sex Respect*, Mast wrote *Love and Life: A Christian Sexual Morality Guide for Teens*, a set of student, parent, and teacher manuals intended for abstinence-only instruction in churches and parochial schools.[76] If one puts the *Sex Respect* and *Love and Life* sets of manuals side by side, it becomes apparent that *Sex Respect* is simply a somewhat secularized version of *Love and Life*. While *Love and Life* abounds with express references to God and religious obligation, *Sex Respect* generally settles for more secular-sounding terminology.[77]

---

75. For discussion of the Christian Coalition, see Justin Watson, The Christian Coalition: Dreams of Restoration, Demands for Recognition (1997). For discussion of the religious right more broadly, see Duane Murray Oldfield, The Right and the Righteous: The Christian Right Confronts the Republican Party (1996), and John W. Storey & Glenn H. Utter, The Religious Right: A Reference Handbook (1995).

76. *See* Coleen Kelly Mast, Love and Life: A Christian Sexual Morality Guide for Teens (rev. ed. 1986). The curriculum package consists of a *Students' Guide* [hereinafter Mast, Love and Life—Students' Guide], *Parents' Guide*, and *Teacher's Guide*.

77. A comparison of the overviews provided at the start of the *Love and Life* and *Sex Respect* student manuals illustrates the point. The *Love and Life* manual begins as follows:

> Adolescence is a wonderful, adventurous time of life. However, it is filled with many difficult questions that appear to have no answers and confusing feelings that seem to serve no purpose. . . .
>
> We must try to understand why these feelings and questions exist. Then, taking this knowledge, we must use it to help us cooperate with God so that we can share in His glory and honor.
>
> In [Unit I] you will discover why adolescence presents many new physical and emotional questions. Spiritual and practical goals will be presented as a means of directing these energies toward good, which is as God desires them to be used. . . .

The religious roots of *Sex Respect*, however, are never far beneath the surface and often emerge quite unmistakably. The *Teacher Manual*, for example, explains:

> There are many valuable contributions an involved community can make to the success of the SEX RESPECT Program. . . . Local churches also have offered their sexual morality units during corresponding weekends while the SEX RESPECT health units were being taught in their public schools during the week. "The Chastity Challenge," also available from Respect Incorporated, is a video designed for use by local churches that wish to supplement the religious values in SEX RESPECT.[78]

The *Parent Guidebook* is similarly revealing when it exhorts parents to complement the *Sex Respect* course by providing the "religious overtones connected with the SEX RESPECT program."[79] Under the heading of "Adding Your Own Religious Values at Home," it tells parents that the course:

> opens the way for deeper discussions about specific moral values so that these can be held in the home at the discretion and under the guidance of parents. Parents also should encourage their own church leaders to supplement these health lessons in a parallel effort with the clear moral teachings of their particular denomination.[80]

Moreover, in an apparent tacit acknowledgment of the special importance it places on injecting religion into the abortion decision, the

---

MAST, LOVE AND LIFE—STUDENTS' GUIDE, *supra* note 76, at 9. The *Sex Respect* manual, on the other hand, offers the following general perspective:

> This is a chapter about SEX, a subject that's sure to get your attention. But before you can learn anything else about the subject, you need to understand what human sexuality is. . . . It's not just our sexual organs and what we do or don't do with them. It's all the traits and values—physical, mental, emotional, and spiritual—that make a person male or female.
>
> One way the word sex is used is to refer to our gender, male or female. From the moment we are conceived, our maleness or femaleness is determined. Even a newborn child is a sexual being. . . .
>
> The word sex is also used frequently to refer to the physical and personal act of male and female genital union, sexual intercourse. This union brings with it an awesome responsibility for the persons involved and thus must be discussed and treated with respect. . . .
>
> Almost everyone will grow to physical sexual maturity without even working at it. But how can we grow to sexual maturity emotionally, mentally, socially, and spiritually?

MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 1-2.

78. MAST, SEX RESPECT—TEACHER MANUAL, *supra* note 8, at 8-9.

79. MAST, SEX RESPECT—PARENT GUIDEBOOK, *supra* note 8, at 13.

80. *Id.*

guidebook later specifically reminds parents that in discussing abortion with their teenagers, "don't forget to add your own religious values."[81] Perhaps even more eye-opening in this regard is the following item that the guidebook lists among things that adolescents need: "A HIGHER POWER, as AA [Alcoholics Anonymous] refers to it. A Being greater than themselves to whom they can pray and ask for help and guidance."[82] Not surprisingly, in offering examples of the type of activities encompassed by another item on that adolescent-needs list—"structured family activities"—the guidebook first mentions "church."[83]

Perhaps out of some sense of how best to sell the program to teenagers, the *Student Workbook* is more subtle than the parent and teacher manuals as far as any connection to religion. The overall tone of the workbook, however, is plainly colored by a conservative Christian influence. The abortion decision, for example, is framed in terms of the consequences for the "unborn child," and the workbook asks in an obviously rhetorical manner whether it is fair to "make the baby die."[84] Similarly, the workbook's characterization of virginity and the need to preserve it for marriage is very difficult to understand except in religious terms. Virginity is "beautiful and priceless" and "must be saved for marriage."[85] Sexual intercourse "unites a man and a woman resulting in an intimate bond," and "[i]f we save sex for marriage, we protect the special bond produced by sexual union."[86] On the other hand, one who ignores this lesson is apparently doomed to a lifetime of guilt:

> [A] 42-year-old woman with three children made the following statement to her teenage daughter: "I had sex before marriage. Even though I knew it was wrong, I tried to make myself think it was right because we were engaged. That didn't help. The guilt still haunts me every time I have sex now, and I've been married over 20 years."[87]

Offering further evidence of the religious roots of abstinence-only programs is the range of agreement between the lessons of abstinence-only programs and conservative Christian beliefs. Virtually all

---

81. *Id.* at 81.
82. *Id.* at 10.
83. *Id.*
84. MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 95.
85. *Id.* at 62.
86. *Id.* at 63.
87. *Id.* at 64.

those programs' basic lessons—abstinence until marriage is essential, premarital sex is inevitably destructive of oneself and others, marriage is the ultimate to which every healthy relationship must aspire, sex within marriage is uniquely fulfilling, abortion is not a legitimate option, homosexual sexual activity is abnormal and must be avoided at all costs[88]—fit neatly with the views, based heavily on literal scriptural interpretation, of the religious right.[89]

It is, of course, entirely possible for lawmakers to take a particular position for secular reasons that others might take for religious reasons. In this instance, however, the *detailed* agreement between abstinence-only programs and conservative Christian beliefs on sex strongly suggests that the two do not coincide by chance. Rather, the most reasonable inference would appear to be that the programs were patterned after those beliefs.

This inference becomes almost irresistible when the massive campaign mounted by the religious right to influence local school boards is taken into account. With sex education, school prayer, the teaching of evolution, and other matters in mind, leaders of the religious right have made it a high priority in recent years to elect more school board members who share, or at least are highly sympathetic to, their conservative Christian views.[90] Moreover, for a variety of reasons, including the relative ease of influencing elections with traditionally low turnout and the appeal of various religious right positions outside their ranks, this campaign for school board influence and control has in many instances achieved considerable success.[91]

Finally, the religious roots of the abstinence-only programs are also evidenced by the programs' very weak logical underpinnings from a secular perspective. Very simply, a good reason to suspect that religion is motivating adoption of the programs is that the programs are so hard to justify with any cogency on nonreligious grounds.

Sex Respect and other abstinence-only programs maintain that teaching abstinence and avoiding instruction in birth control methods is a sound strategy for preventing teen pregnancy and the spread of

88. *See supra* text accompanying notes 8-23.

89. *See* STOREY & UTTER, *supra* note 75, at 2-4, 7-8; WATSON, *supra* note 75, at 170-72; OLDFIELD, *supra* note 75, at 1-2, 56-57, 63-68.

90. *See* OLDFIELD, *supra* note 75, at 190, 217-18; Douglas Frantz & Elizabeth Shogren, *School Boards Become the Religious Right's New Pulpit*, L.A. TIMES, Dec. 10, 1993, at A1.

91. *See* STOREY & UTTER, *supra* note 75, at 14-15; Frederick Clarkson, *Texas School Board Showdown*, IN THESE TIMES, July 26, 1998, at 16; Frantz & Shogren, *supra* note 90; Stryker McGuire, *When Fundamentalists Run the Schools*, NEWSWEEK, Nov. 8, 1993, at 46.

sexually transmitted diseases because it provides students with a "clear message."[92] "When teens are taught contraception in the classroom," the *Sex Respect Teacher Manual* explains, "they are led to believe that this is a legitimate option for them. . . . Since sex outside of marriage is not healthy for the teens in our classes, why offer them advice on 'how to do it'?"[93]

The obvious answer to the manual's question is that the school cannot be sure that the clear-message strategy will always work. To the extent that it does not, then the program is leaving it to chance whether sexually active students use contraceptives and use them as effectively as possible. In fact, the *Sex Respect* program does worse than simply leave this to chance. By magnifying the possibilities that condoms will fail[94] and by vaguely warning that contraceptives "can also carry some health risks,"[95] *Sex Respect* helps foster an attitude in sexually active teens that contraceptives are simply not worth the trouble.

If there were good reason to believe that *both* (1) the clear-message strategy is a very effective means of deterring teen sexual activity and (2) it is a much more effective deterrent than a comprehensive sexuality course that underlines the advantages of abstinence but also teaches birth control methods, then the clear-message strategy might be reasonably defensible in terms of the goal of preventing teen pregnancy and the spread of sexually transmitted diseases. The strategy's ill effects for students who do become sexually active could be seen as a necessary cost of securing benefits not otherwise attainable.

There is so little reason, however, to believe that either of these propositions is true that it is difficult to accept the notion that the strategy was adopted with this goal in mind. The first proposition is implausible on its face. Even if the abstinence-only program sends a clear message, it is simply not credible that students typically will be so impressed that their school urges abstinence that they will for that reason choose to ignore the plethora of contrary advice expressly and implicitly offered them by various of their peers and by much of the society and culture around them. Indeed, the strategy is so simplistic that students seem much more likely to be thoroughly *un*impressed by

92. *See* MAST, SEX RESPECT—TEACHER MANUAL, *supra* note 8, at 7-8.

93. *Id.* at 10; *see also* MAST, SEX RESPECT—PARENT GUIDEBOOK, *supra* note 8, at 11 ("Birth control education for teens weakens the message of abstinence. It gives a double message of 'how to say no and how to say yes' to an age group that only needs clear guidelines.").

94. *See supra* text accompanying note 13.

95. MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 36.

the school's position. It treats as simple and straightforward an issue—whether or not to have premarital sex—that teenagers are agonizing over. They know first-hand that the issue is far more complicated than the abstinence-only program pretends.

The second proposition, that the strategy deters teen sexual activity much better than comprehensive sex education that teaches contraception while counseling abstinence, is similarly flawed. As discussed above, in a world in which students inevitably are getting all kinds of mixed signals about the desirability of premarital sex, the deterrent efficacy of the clear-message strategy must be seriously in doubt. Given also the strong possibility that many, if not most, students will take more seriously the advantages of abstinence when taught those advantages in a program that thoughtfully addresses their full range of concerns, the likelihood that the clear-message strategy is materially better than comprehensive sex education in deterring teen sexual activity seems very remote. Furthermore, empirical studies support what intuition suggests. Study after study shows that discussion of birth control methods as part of a comprehensive sex education program does not have the tendency to encourage teen sexual activity that the clear-message strategy assumes. According to a 1994 report commissioned by the Centers for Disease Control and Prevention to review the results of studies of U.S. schools, the data "strongly support the conclusion that sexuality and AIDS education curriculums that include discussions of contraception in combination with other topics—such as resistance skills—do not hasten the onset of intercourse."[96] Reaching the same conclusion, a 1997 report commissioned by the World Health Organization to review the results of studies within and outside the United States adds that "[t]he impact, if any, of education strategies is in the direction of postponed initiation of sexual intercourse and/or safer practices, such as the effective use of contraceptives."[97]

96. Kirby et al., *supra* note 49, at 352.

97. Anne Grunseit et al., *Sexuality Education and Young People's Sexual Behavior: A Review of Studies*, 12 J. ADOLESCENT RES. 421, 445 (1997); *see also* KRISTIN A. MOORE ET AL., BEGINNING TOO SOON: ADOLESCENT SEXUAL BEHAVIOR, PREGNANCY AND PARENTHOOD (1995) (executive summary prepared for U.S. Department of Health and Human Services of two Department-commissioned reports reviewing recent studies; also available at <http://aspe.os.dhhs.gov/hsp/cyp/xsteesex.htm>).

The abstinence-only approach to homosexuality may be even less logical in secular terms than its approach to premarital sex. As discussed earlier, the approach essentially consists of ignoring homosexuality except to instruct students that avoiding homosexual behavior is crucial to avoiding AIDS.[98] In secular terms this approach is probably most charitably understood in either of two ways. It may assume that homosexuality is really only a matter of personal preference, that homosexuals can therefore become heterosexual if they really want to, and that to avoid AIDS they should want to. Alternatively, it may assume that although homosexuality may not be a matter of personal choice, homosexuals can choose to avoid engaging in homosexual sex and, in light of the dangers of AIDS, they sensibly would make that choice.[99]

One difficulty with the first explanation is that it takes a position on the changeableness of sexual orientation that is hardly noncontroversial. Scientific findings in recent years suggest that there may well be a significant link between genes and homosexuality.[100] More broadly, even if homosexuality or some tendency to it is not biologically determined, it may still be so strongly in place by the teenage years as to be exceptionally difficult to change, if not virtually unchangeable.

A difficulty with the second explanation is that it treats homosexuals' sex life as an inessential part of their existence. As Kenneth Karst has so eloquently explained,[101] a very basic part of a person's self-definition comes from his or her intimate sexual relations with others. A difficulty with both explanations is that they rule out the possibility that, with appropriate precautions, homosexual sex can be safe.

Ultimately, as far as means-end fit, abstinence-only programs are far more easily understood in religious than secular terms. Though sorely lacking in secular logic, the programs make perfect sense as

98. *See supra* text accompanying notes 22 & 23.

99. Particularly in light of *Sex Respect*'s characterization of anal intercourse as "unnatural behaviors" that use "body openings . . . in ways for which they were not designed," *see* MAST, SEX RESPECT—STUDENT WORKBOOK, *supra* note 8, at 52; *supra* text accompanying note 23, it may fairly be argued that both of these interpretations are unduly charitable. For a critique of the notion that the only normal orientation is heterosexual, see ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, *in* BLOOD, BREAD, AND POETRY 23 (1986).

100. *See* Curt Suplee, *Study Provides New Evidence of 'Gay Gene,'* WASH. POST, Oct. 31, 1995, at A01; Traci Watson et al., *Is There a 'Gay Gene'?*, U.S. NEWS & WORLD REP., Nov. 13, 1995, at 93.

101. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

means to give effect to the conservative Christian view that premarital sex and homosexual conduct are sinful and categorically must be avoided on that account. The programs strenuously preach avoidance of these sins, and in failing to provide contraceptive instruction that might help sexually active teens avoid becoming pregnant or contracting sexually transmitted diseases, the programs do nothing more than allow these sinners to suffer the consequences of their sins.

B. The Endorsement Test and Impermissible Purpose

Under the endorsement test, as well as the *Schempp* and *Lemon* tests from which it emerged, proof that a law is based on a purpose of endorsing religion is a basis for invalidation.[102] The proof requirement, however, is quite formidable. Although the Court's statements on the matter have varied to some degree over the years, it seems clear that a law will not be struck down on the basis of an impermissible purpose of endorsing religion unless the challenger can show that the law was adopted entirely or almost entirely for that purpose.[103]

Despite the considerable evidence that abstinence-only programs are rooted in a purpose of endorsing conservative Christian views, a challenger surely faces a difficult task in trying to persuade a court that such a program should be invalidated on the basis of impermissible purpose. The challenger would have to show that the program is not based to any significant degree on secular purposes, but rather is based virtually entirely on religious purpose.

It is hardly apparent, however, that this task is insurmountable. In particular, the fact that the challenge in this instance concerns the role of the Establishment Clause in public schools is crucial in suggesting that it is not. As the Court explained in 1987 in *Edwards v. Aguillard*:[104]

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their

102. *See supra* text accompanying notes 68-74.

103. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose"); Stone v. Graham, 449 U.S. 39, 41 (1980) (the "pre-eminent purpose" of a law must not be "plainly religious in nature").

104. 482 U.S. 578 (1987).

> attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . ."[105]

In *Edwards* this special vigilance led the Court to disbelieve the stated legislative purpose of protecting academic freedom and to invalidate under the purpose prong a Louisiana statute requiring that public schools teach "creation science" whenever they teach evolution. In a similar vein, despite an articulated legislative purpose of providing instruction in a "fundamental legal code," the Court in *Stone v. Graham*[106] concluded that a state law requiring that the Ten Commandments be posted in public school classrooms rested on a "preeminent" purpose of endorsing religion;[107] and the Court in *Schempp* found a fatal purpose of endorsing religion in the teeth of state claims that the mandated Bible-reading and prayer practices under review were designed to serve such secular purposes as the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[108]

As noted earlier, the Court in *Epperson v. Arkansas* stated as a basic Establishment Clause principle that the state may not "require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[109] In both *Epperson* and *Edwards* the Court found that the state was guilty of such intentional tailoring with regard to public schools' curricula on human origin. If a court is presented with an Establishment Clause challenge to an abstinence-only program, a similar finding would be in order.

Given the demanding nature of the Court's approach to impermissible purpose in the Establishment Clause area, there is no doubt room for reasonable disagreement with this conclusion. As argued elsewhere, however, there is good reason to question whether the Court's approach is not unduly demanding.[110] To require an exclusive

105. *Id.* at 583-84 (citations omitted).
106. 449 U.S. 39 (1980).
107. *See id.* at 41.
108. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 223-24 (1963).
109. 393 U.S. 97, 106 (1968).
110. *See* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 908-11 (1987).

or nearly exclusive purpose of endorsing religion before a law can be invalidated for impermissible purpose is inconsistent with what appears to be the basic rationale for invalidating laws for impermissible purpose. As Paul Brest explained in a passage later cited by the Supreme Court[111] as authority for revising its approach to impermissible purpose in the equal protection area:

> The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of the decision. The decisionmaking process consists of weighing the foreseeable and desirable consequences of the proposed decision against its foreseeable costs. . . . To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.
>
> . . . Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives. . . . [O]nly the political decisionmaker—and not the judiciary—has general authority to assess the utility and fairness of a decision. And, since the decisionmaker has (by hypothesis) assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.[112]

In keeping with the above rationale, the Court should revise its approach to impermissible purpose under the endorsement test to require the invalidation of any law that would not have been adopted but for a purpose of endorsing religion.

Under such a revised approach, abstinence-only programs should be invalidated if their adoption depended on a purpose of endorsing religion, even if such a purpose was not exclusive or even primary. Given the available evidence of impermissible purpose, a conclusion that abstinence-only programs fail to survive under this revised approach to impermissible purpose would be very difficult to avoid.

C. The Endorsement Test and Impermissible Effects

The endorsement test, like the more encompassing *Schempp* and *Lemon* tests from which it originated, worries about both purposes

111. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 & n.12 (1977).

112. Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-17.

and effects. As Justice Souter succinctly explained, "Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer."[113] The endorsement test guards against government action that has the effect of endorsing religion even if such action cannot be shown to rest entirely or almost entirely on a purpose of endorsement. So doing, the endorsement test tacitly recognizes that the various harms inflicted by endorsements—most obviously, harms to nonadherents of the favored religion, but also harms to the favored religion and to the system as a whole[114]—are not limited to instances in which the test's very demanding burden of proof of impermissible purpose can be met.

Although the endorsement test's inquiry into effects is distinct from its inquiry into purpose, the effects inquiry cannot sensibly be divorced from questions of purpose. The effect prong of the test basically asks whether a reasonable observer acquainted with the history and context of the challenged governmental action is likely to view such action as sending a message of state support of religion.[115] The reasonable observer's perception of the purpose or purposes underlying the challenged action cannot help but influence significantly his or her perception of the message that the governmental action sends.

In the case of abstinence-only sex education programs, the substantial evidence of religious purpose, even if insufficient to warrant invalidation under the purpose prong of the endorsement test, goes a long way to justify invalidation under the second prong. This is particularly so because the core audience receiving any message of endorsement that the programs may convey are students. As the Court in *Edwards* recognized in the passage quoted above,[116] students are an impressionable and captive audience to messages that the state conveys in the schools. According to *Edwards*, students therefore deserve special judicial solicitude in the form of special sensitivity to the possibility that governmental action in the schools is based on a *purpose* of endorsing religion. The *Edwards* Court did not specifically address

113. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 787 (1995) (Souter, J., concurring).

114. For discussion of the various harms caused by endorsements, see Simson, *supra* note 42, at 463-68.

115. *See, e.g.*, Allegheny County v. ACLU, 492 U.S. 573, 592-94, 599-600 (1989); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

116. *See supra* text accompanying note 105.

whether, under its reasoning, special judicial sensitivity to the possibility that governmental action in the schools has an *effect* of endorsing religion is also in order. It is difficult to see, however, why it would not be.

Aside from this matter of appropriate judicial attitude, it is important that students are the target audience because students—at least those of high-school age—may well be the group most likely to sense the religious underpinnings of the abstinence-only programs and perceive a message of state support of religion. They live in a world in which more and more of their peers are sexually active and in which television, music, movies, and so many other influences virtually ensure that teenage sexual activity is not about to become a thing of the past any time soon. As a result, they almost cannot help but be extremely skeptical of the secular explanations offered for a curriculum that purports to stem teenage pregnancy and the spread of sexually transmitted diseases but steadfastly refuses to provide contraceptive instruction. They are also at an age at which they are first starting to come seriously to grips with their sexual identity and are therefore very conscious of their own and others' sexuality. Consequently, they are especially prone to question whether a curriculum that virtually ignores the existence of homosexuals and treats homosexual sex as an unnatural activity that everyone should simply avoid really has anything to do with the secular explanations offered.

In short, a hypothetically "reasonable" student even moderately acquainted with the political and social history of abstinence-only programs would not hesitate long before concluding that this curriculum that makes so little sense in secular terms is genuinely rooted in religious purpose. Having come to that realization, the student would readily perceive the school's offering of abstinence-only instruction as sending a message of state support of religion.

A strong and, in our view, ultimately persuasive argument therefore can be made for invalidating abstinence-only programs under the endorsement test's effect prong. Does that mean that the Supreme Court therefore can be expected to invalidate such a program if an Establishment Clause challenge to an abstinence-only program comes before it? The Court's and, in particular, Justice O'Connor's application of the effect prong in the past cautions against simply assuming that the answer is "yes."

If Justice O'Connor could not be persuaded that abstinence-only programs violate the effect prong, it is almost inconceivable that a

majority of the Court would so hold. If, however, she could be so persuaded, it is very likely that a majority would so hold. She appears to be the paradigmatic swing vote on such a question. She is substantially more likely to find a violation of the endorsement test than the Chief Justice and Justices Kennedy, Scalia, and Thomas, all of whom seem to favor diluting, if not simply abandoning, the endorsement test.[117] She is also at least somewhat less likely to find a violation of the test than Justices Breyer, Ginsburg, Souter, and Stevens, all of whom have tended to apply the Establishment Clause more strongly than Justice O'Connor.[118]

As is perhaps best illustrated by Justice O'Connor's opinion and votes regarding the two holiday displays in *Allegheny County v. ACLU*,[119] she is willing to find a violation of the effect prong but slow to do so. On the one hand, Justice O'Connor joined with four other Justices in holding that a creche standing alone in a central location of a county courthouse had the effect of endorsing religion. On the other hand, she joined with five other Justices in holding that there was no endorsement effect when a city, in front of a city-county government building, displayed a giant Hanukkah menorah alongside a Christmas tree and a sign extolling liberty. While finding that the creche sent a message of state support of Christianity, Justice O'Connor concluded that the other display sent a message of support not of Judaism or Christianity or religion in general but rather of "pluralism and freedom of belief during the holiday season."[120] Though not indefensible, the latter conclusion at a minimum reflects a willingness to apply the endorsement test with a significant degree of deference to the government.

Realistically, then, whether or not a majority today could be mustered on the Court for invalidating abstinence-only programs under the effect prong must be seen as something of an open question. Lower courts, however, have ample authority under existing precedent for holding that such programs send a message of state support of religion and for striking them down on that account. Moreover,

117. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-69 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.); Allegheny County v. ACLU, 492 U.S. 573, 668-77 (1989) (opinion of Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White and Scalia, JJ.).

118. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

119. 492 U.S. 573 (1989).

120. *Id.* at 635 (O'Connor, J., concurring).

respect for the Establishment Clause principles embodied in the endorsement test strongly suggests that the time is ripe for challenging abstinence-only programs in the courts on both purpose and effect grounds.

IV. THE ROLE OF THE RELIGION CLAUSES OUTSIDE THE COURTROOM

In closing, it may be helpful to emphasize that the values underlying the Religion Clauses are not committed by the Constitution to judicial enforcement alone. In providing opt-outs for religious objectors to comprehensive sex education, lawmakers have acted on behalf of the religious liberty interest reflected in the Free Exercise Clause. Even if we are correct that free exercise objections to comprehensive sex education should not prevail in court under existing free exercise law, lawmakers are entirely within their right to seek to accommodate these objections by providing for opt-outs. To avoid overstepping, however, the Establishment Clause's prohibition on favoring religion over nonreligion, any such accommodation should extend beyond religious objections to secular ones of comparable personal force.[121] Moreover, as suggested by our constitutional analysis in Part II, we seriously question from a policy perspective the wisdom of opt-out provisions. In our view, the benefits in terms of religious liberty promised by such provisions are insufficient to warrant the costs to important state interests that they entail.

Whether or not the arguments that abstinence-only sex education violates the Establishment Clause ultimately prevail in court, the arguments should weigh heavily on the minds of lawmakers. Is adoption of such a program genuinely defensible on nonreligious grounds? Doesn't adoption of such a program send a message of government endorsement of religion and cause various ill effects as a result? In our view, lawmakers mindful of Establishment Clause values should not hesitate long before concluding that the abstinence-only approach is an unsound choice.

121. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Simson, *supra* note 110, at 914-15; Simson, *supra* note 42, at 478.